82-646

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OCT 13 1982
ALEXANDER L. STEVAS,
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

JURISDICTIONAL STATEMENT

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IN PROPRIA PERSONA

OCTOBER 11, 1982

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SIDNEY HERSH YATEMAN, Appellant

v.

BARBARA LEE YATEMAN, Appellee

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

JURISDICTIONAL STATEMENT

Appellant Sidney Hersh Yateman appeals from the final judgment of the Court of Appeal of California, First Appellate District, Division Three, following the California Supreme Court's denial of his petition for hearing.

QUESTIONS PRESENTED

I. Whether the Lower Court can assert res judicata and consider it a "final judgment" when the State Court retains jurisdiction over a federal benefit.

II. Whether the State Court judgment is immune from collateral attack when, as here, the State Court did not have subject matter jurisdiction to divide Appellant's Army retired pay because of Federal pre-emption.

III Whether the system of military retirement benefits established by Congress as upheld in McCarty v. McCarty, (subsequently changed by Congressional Legislation) is retroactive to those cases pending appeal prior to McCarty being granted a hearing by this Honorable Court.

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OPINIONS BELOW

The Court of Appeal issued its second unreported opinion on May 12, 1982. (App. A, infra.) The first unreported opinion was issued on November 29, 1979. (App. C, infra.) The California Supreme Court rendered no opinion when it denied Appellant's Petition for hearing on July 22, 1982. (App. D, infra.)

JURISDICTION

The California Court of Appeal entered its judgment on May 12, 1982. The Supreme Court of California denied Appellant's petition for hearing on July 22, 1982. A notice of appeal to this Court was duly filed in the California Court of Appeal on August 4, 1982.

This appeal is being docketed within 90 days of the California Supreme Court's denial of Appellant's petition for hearing.

Appellant has argued below that § 4800(a) of the California Civil Code, as

it purports to characterize federal military retirement pay as community property, was repugnant to federal statutes and had been pre-empted by federal statutes and therefore was invalid under the United States Constitution. The California courts upheld the statute's validity.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Dahnke Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); McCarty v. McCarty, 453 U.S. ____ (1981).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes:

37 U.S.C. § 701 (a)

California Civil Code § 4800(a)

Title X Uniformed Services Former Spouses' Protection Act (Sep. 1982)

These statutes, along with Article VI, clause 2 of the United States

Constitution, appear in Appendix F.

STATEMENT OF THE CASE

The parties were married on June 14, 1959. Appellant commenced active duty in the U. S. Army on June 3, 1959. On March 13, 1977, Appellee filed for divorce in the Monterey superior court. The parties were divorced by interlocutory judgment entered on November 29, 1978. The superior court entered final judgment of divorce on June 13, 1979. Appellant retired from the army on June 1, 1982, after twenty-three years of active duty.

Appellant made a motion to the Trial Court in December, 1979, to set aside that portion to interlocutory and final decrees in which jurisdiction was retained over military retirement benefits by characterizing them as community property. At the time, the Appellant was an Army officer on active duty. The Appellant had never agreed to divide his retirement benefits and did not voluntarily or freely

stipulate to it at the time of interlocutory decree, one year before his rights vested. In his petition, the Appellant stated he was a Florida domiciliary. Although he was in California by virtue of his military orders, he had been and still remains a Florida domiciliary.

The Appellee claimed a portion of the husband's right to retirement pay under community property concepts established by Section 4800 of the Civil Code although at the time of her petition for dissolution on March 13, 1978 she was a registered voter in Florida and had signed her California Income Tax Return in January, 1978 that she was a Florida domiciliary. Appellant waived jurisdiction because of his military duties.

Appellant claimed his future military benefits as separate property and refused to claim them as community property on the initial financial

declaration on March 24, 1978 filed April 13, 1978 in the trial court. A copy was not made part of the Clerk's Transcript in the first appeal in Case #46564 but was provided to the Court of Appeal, attached to Appellant's petition for rehearing in Case #49751. Appellant was required to sign a revised financial statement which listed military benefits as community property, over objection, because he was told "it was the Law" and he would have to do it. Even as Appellant signed the revised financial declaration, he told Appellant's previous attorney of record that he was not in agreement with the law and would not stipulate voluntarily to such a law. In fact, he stated he wanted to take the matter to the U. S. Supreme Court for resolution. When other matters in Case #46564 were appealed (1st Appeal) Appellant insisted on including the military benefit issue also but attorney said it could not be done because the law

required otherwise. Hence no appeal was made on this issue at that time as noted by Court of Appeal decision in Case #49751 (2nd Appeal).

After the decision In Re Marriage of Milhan II (1979) 97 Cal. App. 3d 41, Appellant became aware that it was not illegal to claim separate property on military entitlements. Appellant obtained briefs from Commander Milhan and requested that Appellant's attorney again correct the matter of stipulation. Attorney decided to use California Code of Civil Procedure Section 473 to submit the material provided to him by Appellant. Attorney had argued that since all military entitlements would go to Appellee if Appellant became deceased during the period of interlocutory decree, that it was the date of final decree which was the critical date. The motion based on the California Civil Procedure Section 473 was timely filed within six (6) months of the

final decree. The Court of Appeal in Case #49751 stated that the motion pursuant to California Civil Procedure Section 473 was not timely filed since it was submitted more than six (6) months after the interlocutory decree.

Ten (10) months after the filing of the Appellant's Opening Brief, the United States Supreme Court granted a hearing on direct appeal in McCarty v. McCarty

Before the Court of Appeal, Appellant argued that various Federal enactments relating to army retirement pay justified the conclusion that Federal law had pre-empted California's community property scheme insofar as an allocation of army retirement pay to a non-employee spouse was concerned.

In this regard, Appellant laid stress on the significant developments in applicable case law between the date of the filing of Appellant's Reply Brief and the date set for oral argument. Such

developments were documented in the Supplemental Points and Authorities filed on April 19, 1982.

The decision of the Court of Appeal was rendered on May 12, 1982. The full text of the opinion is set forth in Appendix A. In its decision, the Court decided the issue of the merits against the Appellant. As to the stipulation issue, it held Appellant was subject to res judicata. With respect to the Federal pre-emption argument, the Court of Appeal ignored any reference to it except to say that McCarty does not apply retroactively. The court neglected to discuss the federal issue of pre-emption. It never discussed finality with regard to reservation of jurisdiction over a federal property right. It failed to respond to the involuntary stipulation issue. Lastly, it denied an application for permission to file a motion to remand for an evidentiary hearing on the voluntariness of the

stipulation and it denied a petition for rehearing.

The Appellant petitioned for a hearing in the Supreme Court of California, reiterating his previous arguments and pointing out that the Court of Appeal's decision in the case at bar conflicted with McCarty v. McCarty, 453 U.S. _____(1981). On July 22, 1982, hearing was denied in the California Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

The questions raised warrant plenary consideration for six reasons:

A. TECHNICALLY, NO FINAL JUDGMENT HAS YET BEEN ENTERED IN THIS CASE.

"Finality" in this sense is purely a creature of U.S. Supreme Court rules and practice does not embody any state law concept pertinent here. See Market St. Ry. Co. v. R. R. Comm., 324 U.S. 548, 551 (1945).

Here, the situation is compelling for not applying a mere "rule of procedure" (see Di Genova v. State Board of Education, 57 Cal. 2d 167, 179 (1962) to evade a determination of this case on the merits. In the intervening period since the initial appeal the United States Supreme Court has decided Hisquierdo and subsequent to the second appeal, it decided McCarty. Also, Congress has now enacted federal statutes which, have caused a marked change or clarification in the supreme law of the land (Art. VI, CL. 2, U.S. Const.). To apply res judicata, as did the court below, in such circumstances would be as legally inappropriate as it would be unjust and therefore, it is in the interest of expeditious and fair administration of justice to review the issues presented in light of McCarty and rather recent federal statutory enactments. The ends of justice require recognition of interests other

than those of mere "expediency."

In the case before this court, Appellant made a motion in the trial court not after appeal was granted to McCarty but ten (10) months before an appeal was granted to McCarty. (See In Re Marriage of Sheldon, 124 Cal. App. 3d 371 (1981). This timely action reenforces Appellant's claim that continued enforcement of the trial court stipulation would be unjust in light of the U. S. Supreme Court decision in McCarty.

Sheldon held, in part, that McCarty should not be applied to cases not final on appeal unless the military spouse requested that the trial court "reserve jurisdiction" on the character of the property interest in the pension or timely raised and briefed the Federal pre-emption issue on appeal.

If the criterion for retroactive application of McCarty is finality of the prior judgment, then it should make no

difference whether a reservation of jurisdiction was reserved by Appellant or respondent, or, for that matter, what issue is specified in the order of reservation. The emergent fact is that the judgment is not final. Something remains to be done. It would be inequitable to conclude that the judgment is final as to all other matters. Often the terms of a judgment are so interdependent that amendment or substitution of one term, will necessarily require review of the others. If the judgment is not final for all purposes, it is still pending and by its terms, McCarty is applicable to the judgment in toto.

The Hisquierdo case in 1979 told California it could no longer divide Railroad Retirement Act benefits as community property. The implication was clear that California might not have the power to divide military retired pay as community property.

In the case before this court it should be noted that the Appellant was never a resident of California, was on active duty in the military service, and subject to California jurisdiction only by virtue of his military assignment within the state. At the time of the interlocutory decree on November 15, 1978 Appellant's military retirement benefits had not even vested (vested June 3, 1979). Appellant completed active duty military service on June 1, 1982. Even as of this date no division of military benefits has been made. The state court has merely retained jurisdiction which, in light of the McCarty case must be void on its face.

Furthermore, Appellant requested that this court in reviewing this case on appeal as it relates to the community vis-a-vis separate property nature of military retired pay consider the following:

The application of the federal standard;

Address the federal issues;

Discuss the federal intent;

Discuss state policy as it conflicts with the federal standard;

Address the comments of the U. S. Supreme Court made in Hisquierdo regarding California courts ignoring the 1977 Social Security Legislation.

None of these issues were addressed except to mention that McCarty was not deemed retroactive. The decisional basis upon which the Court of Appeal's decision rests in this case is palpably inadequate.

B. ONLY THE CONGRESSIONAL LEGISLATION PASSED IN SEPTEMBER, 1982 (TITLE X UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT), ENABLES STATES TO DIVIDE MILITARY RETIREMENT PAY AS OF FEBRUARY 1, 1983 BUT NOT FOR PRE McCARTY CASES.

The recent bills passed in Congress in September, 1982, which permit states to divide military retirement benefits

between both spouses now changes the Congressional intent. It has been long recognized that Congress can change the rules for benefits at its discretion as it has done before. This matter was thoroughly discussed in Hisquierdo and McCarty by the U. S. Supreme Court, However, until such bills were actually passed by the Congress, the military benefits were separate property. The very fact that such bills were needed to change the rules only serve to further the argument that the California Supreme Court has ignored Congressional legislation heretofore and therefore its ruling that military retirement benefits are community property is void on its face because it interfered with the objectives and requirements of the military pay retirement system.

C. NO RES JUDICATA DEFENSE CAN BE ASSERTED BY THE COURT, BECAUSE, PROPERLY VIEWED, APPELLANT IS

PURSUING A NEW CAUSE OF ACTION AS A DEFINITIONAL MATTER.

The defense of res judicata is properly raised only when the same cause of action is asserted between the same parties to a prior argument. If these two (2) criteria are satisfied, finality may attach to issues litigated in the prior action; finality may also attach to issues which could have and should have been litigated but were not.

If the same parties are involved in a dispute, but the cause of action is not the same, principles relating to collateral estoppel (but not to res judicata) apply. Finality will attach to issues actually litigated in the prior litigation; but finality will not attach to issues that were not actually litigated. Commissioner v. Sunnen, 333 u.s. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948).

Here, the technical distinction

between res judicata and collateral estoppel appears to be significant. The issue of federal pre-emption and the subject matter jurisdiction of the Supreme Court was neither presented in 1978 to the Court nor considered by it. The specific applicability of the anti-assignment statute applicable to army retired pay, 37 U.S.C. Section 701 (a) was not considered by the state court. Nor did the state court in 1978 consider whether army retired pay represented reduced pay for current reduced services.

If as Appellant contends -- and the host of federal cases have determined -- his retired pay represented reduced pay for current services, and such pay, as he receives it from the army, is his separate property and may not be treated as community property to the extent that it is earned after the dissolution of the marital community.

Since the cause of action is not the

same in these proceedings as in the court proceedings in 1978, only collateral estoppel should apply. And collateral estoppel is inadequate to bar a consideration here of the issues not litigated in the 1978 action.

D. ASSUMING THE DISPUTE BETWEEN THE PARTIES TO THE 1978 JUDGMENT PROPERLY INVOLVES A RES JUDICATA ISSUE, THE COURT JUDGMENT IS NOT IMMUNE FROM COLLATERAL ATTACK.

Collateral attack is proper where, as here, the court did not have subject matter jurisdiction to divide Appellant's army retired pay because of federal pre-emption.

Res judicata is a defense on the merits to a cause of action; it denotes that a prior judgment, rendered on the merits, is a bar to a subsequent action between the same parties upon the same claim or demand. Commissioner v. Sunnen,

Cromwell v. County of Sacramento, 94 U.S. 351, 352-353, (1877).

The prior decision cannot be denied res judicata effect (or immunity from collateral attack) in subsequent litigation between the same parties on the same cause of action, merely because the first decision may have reached an erroneous conclusion. So much has been reaffirmed by the recent decision of the Supreme Court in Federated Department Stores, Inc. v. Moitie, 453 U.S. ____, (1981). Moitie rejects the view -- which had enjoyed substantial prior support in the case law -- that relief from a prior judgment can be grounded upon strong equitable grounds alone -- i.e., "simple justice."

Appellant's challenge to the subject matter jurisdiction of the state court is based upon federal pre-emption grounds. A collateral attack based upon such ground remains a valid method by which to

challenge a prior state court judgment. The vitality of this doctrine has not been diminished or affected by Moitie. The doctrine -- given its clear articulation in Kalb v. Feuerstein, 308 U.S. 433, (1940) -- has been reaffirmed by the Supreme Court, in a family law context in a post-McCarty case, Ridgway v. Ridgway, 453 U.S. ____, (1981).

A determination by a state court that it has jurisdiction of the case presented to it is generally conclusive, at least when the jurisdictional question has been fully litigated. In Durfee v. Duke, 375 U.S. 106, (1963), "the Court stated the 'general rule' that '(a) judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the (second) court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment'." 375 U.S. at 111, as quoted in

Key v. Wise, 629 F 2d 1049, 1056 (5th cir. 1980). The Durfee court conceded, however, that this general rule of finality of jurisdictional determination is subject to an exception: the "(d)octrines of federal pre-emption...may in some contexts be controlling." 375 U.S. at 114.

With a collateral attack on the state court judgment on the ground that the state court did not have jurisdiction over the subject matter by virtue of federal pre-emption, that overriding consideration must engage the attention of the court before giving finality to the prior state court decision.

In its analysis, this Honorable Court in the Ridgway case gave much attention to an anti-attachment statute that applied to servicemen's life insurance proceeds. Using this provision to support the federal pre-emption argument, the court swept away the earlier injunction

requiring the husband to retain the insurance policies in favor of the children. The court even disregarded the stipulated property settlement reached by the parties which had been the basis of the Maine divorce decree:

> We find nothing to indicate that Congress intended to exempt claims based on property settlement agreements from the strong language of the anti-attachment provision.
> -453 U.S. at ____, 102 S. Ct. at 58, 70 L. Ed. 2d at 52 (footnote omitted).

McCarty v. McCarty arose as a direct attack upon the judgment of a California divorce court; the Supreme Court did not deal with any question concerning the res judicata effect to be given to a prior judgment. The McCarty court found a sufficient threat of "grave harm to 'clear and substantial' federal interests" to require that conflicting state laws giving effect to state public policy concerns based upon community property principles

must give way. "State courts are not free to reduce the amounts that Congress has determined are necessary for the retired member."

McCarty has been applied retroactively in an intelligent analysis and application based upon the federal pre-emption principles set out in Kalb v. Feuerstein, supra. A Texas Court of Appeals in Ex Parte Buckhanan, 626 S.W. 2d 654 (1981), considered a collateral attack on a 1977 Texas divorce judgment dividing Air Force retired pay in accordance with Texas community property law. After discussing the McCarty decision, the Court noted as follows:

> In determining how McCarty affects the judgment under collateral attack before us, it is essential to focus upon what the court said. McCarty pre-empted nothing: it only considered, determined and announced what Congress had already done.
>
> ***

> Respondent argues that the judgment under attack in the case before us is at worst erroneous, and not void, and that the relief sought by relator is thus barred by the doctrine of res judicata. We cannot agree. The court pointed out in McCarty that when Congress enacted the military retirement system, it acted pursuant to its express constitutional power over the armed forces; and the court observed further that "in no area had the court accorded Congress greater deference than in the conduct and control of military affairs." -- U.S. at ____, 101 S. Ct. at 2743, 69 L. Ed. 2d at 608. When Congress has exercised its plenary power to a particular subject, judgments of state courts purporting to exercise jurisdiction over the pre-empted subject are "nullities and vulnerable collaterally." Kalb v. Fuerstein, 308 U.S. 433, 436, 60 S. Ct. 343, 344, 84 L. Ed. 370 (1949).

The analysis and decision in this Texas court opinion should commend itself to this Court. This analysis is but the logical application of federal pre-emption principles set down in McCarty; it will sustain a collateral attack of the prior

state court judgment in this case in a manner made necessary by Kalb v. Feuerstein, supra. and Ridgway v. Ridgway, Supra.

Additionally, collateral attack is proper on a permanent injunction where changed circumstances exist since the prior judgment. Appellee will soon bring a Petition to Compel compliance with the 1978 state court judgment. The 1978 judgment was in the form of a permanent injunction against Appellant directing him, at a point in the future when he would retire from the Army, to pay to petitioner a portion of each monthly pay of Army retirement pay in a stated percentage.

The injunctive command directed by the state court to Appellant was not and could not have been set out as a simple money judgment. The amount Appellant might secure in the future from the Army as retired pay was conjectural: Appellant

might not live long enough to secure any Army retired pay or he might have left the Army before his benefits vested. Further, the amount may be altered from time to time, since retired pay derives from statutory provisions alone and is not based upon contract principles. Finally, the dollar amount of retired pay changes because of the application of cost of living increases which affect the amount of retired pay the Appellant is to receive.

In Jackson v. DeSoto Parish School Board, 585 F. 2d 726 (5th cir. 1978), a prior permanent injunction reapportioning the school board was challenged. Defendants contended that the prior injunction was immune from attack. The Court Disagreed:

> A challenge to the constitutionality of a court-ordered reapportionment plan is not, in either case, precluded by principles of res judicata or collateral estoppel. It has long been established that res judicata

is no defence where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions. See, e.g., Commissoner of Internal Revenue v. Sunn, 1948, 333 U.S. 591, 599-602, 68 S. Ct. 715, 720-21, 92 L. Ed. 898, 906-08;

State Farm Mutual Automobile Insurance Co. v. Duel, 1945, 324 U.S. 154, 162, 65 S. Ct. 573, 577, 89 L. Ed. 812, 819. In these cases, the operation of the preclusion doctrines would result in unequal treatment of similarly situated individuals, some of whom have the misfortune to have sought legal redress at an earlier phase of legal developments.

Such inequity becomes particularly intolerable when, as here, constitutional rights are involved. This court has thus been unwilling to bar subsequent challenges to apportionment schemes, seemingly constitutional when instituted by the court, but apparently inadequate under the rapidly changing jurisprudence in this area. (citations omitted). As Judge Wisdom wrote in Parnell v. Rapides Parish School Board, supra, 563 F. 2d at 185, "Faced with changing law, courts hearing questions of constitutional right cannot be limited by

> res judicata. If they were, the Constitution would be applied differently in different locations.

See also, Moch v. East Baton Rouge Parish School Board, 548 F. 2d 594 (5th cir. 1977) cert. den. 434 U.S. 859 (1977).

Appellant should not be barred by preclusion principles from showing that an injunction should be modified or dissolved in light of changing circumstances, unexpected burdens or the injunction's failure to achieve the intended benefits.

The application of McCarty to these principles is manifest. An injunction, permanent in nature, requiring Appellant in this case to make payments to petitioner of his Army retired pay, long after the Supreme Court has declared on constitutional grounds that federal statutes bar such a result, is just such a changed condition adequate to modify the state court's permanent injunction.

E. CALIFORNIA CASE PRECEDENTS AGAINST COLLATERAL ATTACK ARE WEAK, DISTINGUISHABLE AND UNPERSUASIVE.

The California courts provide cases to support its position In Re Marriage of Sheldon, 124 Cal. App. 3d 371, (1981); In Re Marriage of Mahone, 123 Cal. App. 3d 17, (1981) and In Re Marriage of Fellers, 125 Cal. App. 3d 254, (1981).

Appellant is also aware of Erspan v. Badgett, 657 F. 2d 550, rehearing denial, 659 F. 2d 26 (5th Cir. 1981) decisions which consider the possible retroactive application of McCarty. Unlike Ex Parte Buckhanan, supra,all four (4) reject the power of McCarty to disturb the finality of prior state court dissolution decrees dividing military retired pay benefits.

Each of these four (4) decisions considers the collateral attack on res judicata solely (or largely) as a state law issue. None considers the doctrine of

federal pre-emption as a possible justification for a collateral attack on the prior state court judgment. No case among these four (4) even remotely pursues the analysis followed in Ex parte Buckhanan, supra, none even mentions Kalb, Ridgway, or the Restatement of Judgments.

It is clear that this court must consider the retroactive application of McCarty as a matter governed by federal law. The extent to which a federal court must attach conclusive effect to prior state court proceedings is a federal question. Adam v. Sanger, 303 U.S. 59, 64; (1938); American Mannex Corp. v. Rosands, 462 F. 2d 688, 689 (5th Cir. 1972). Indeed, since McCarty is a case involving federal pre-emption of state law, it is surprising that the four (4) cases considering McCarty do not apply federal law in determining whether conclusive effect should be given to prior, pre-McCarty, state court proceedings dividing

military retired pay.

But further: If Erspan presumes to follow Texas state law, the authoritative statement on Texas law is found in Ex Parte Buckhanan, supra, which Appellant now commends to the attention of this court. Moreover, Texas cases adopted the federal pre-emption rationale without having been bludgeoned by McCarty to do so.

By far the most interesting of the four (4) cases considering McCarty is In Re Marriage of Sheldon, supra.

The Sheldon Court considered the retroactivity issue within the context of Supreme Court decisions, most particularly, Chevron Oil Co. v. Huson, 404 U.S. 97, (1971).

Huson is not, however, a federal pre-emption case, nor are any of the other Supreme Court cases cited by the Sheldon Court.

It is peculiar that Sheldon chose Huson at all as the applicable test, since Kalb would have been more appropriate. (Ridgway, argued before the Supreme Court on October 7, 1981, was decided one (1) month after Sheldon). Huson is in any event largely superseded by Federated Department Stores, Inc. v. Moitie, supra, decided in June, 1981. Moitie appears to limit Huson substantially; if the Sheldon Court had considered Moitie, it would, no doubt, have relied upon it without even considering Huson.

Sheldon looks to California cases that hold a military pension constitutes community property; Sheldon makes no effort to look at relevant federal law to determine whether the decision in McCarty had been foreshadowed by federal law. In fact, it had:

1. The Supreme Court of the United States has considered the conflict between federal law and state community property

principles six (6) times this century, and in each such confrontation federal law has been held to pre-empt the application of state community property principles.

2. In several of these confrontations, a decisive -- or at least important -- element for decision was the existence of a federal anti-assignment or anti-attachment statute which was held to pre-empt the application of state community property principles.

Army and Air Force retired pay is also subject to an anti-assignment statute -- 37 U.S.C. Section 701 (a) and (c). This section had already been interpreted by two (2) federal courts of appeal and one (1) state Supreme Court as voiding all assignment of interests in military pay. The McCarty Court had little difficulty in extending the anti-assignment views of its prior pre-emption decisions to Section 701. See McCarty at 101 S. Ct. 2739-2740, 69 L. Ed. 2d 603-604.

3. Sheldon considers the "well-settled California precedent holding a military pension constitutes community property" to be antediluvian in origin. But that is not so. The application of community property law to military retired pay to be received by the servicemen is a fairly recent state law development. In Re Marriage of Fithian, (1974) 10 Cal. 3d 592.

4. Finally, in terms of federal law, the decision in McCarty was clearly foreshadowed by the very long line of federal cases holding that military retired pay is but reduced payment for reduced services. Although McCarty pulls back from resting its holding on this ground, 453 U.S. ____, the McCarty Court points out that state courts were on notice that this doctrine may of itself defeat a state court's application of community property principles.

But Sheldon sees the universe only through California eyes. The cardinal error in Sheldon is that the Court fails to note that "(t)he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Ridgway v. Ridgway, supra, at 102 S. Ct. 55, 70 L. Ed. 2d at 48-49, quoting from Hisquierdo, 439 U.S. 572, at 581. See also, to same effect, Free v. Bland, 369 U.S. 633, 666 (1962); Gibbons v. Ogden, 9 Wheat. 1, 210-211 (1824).

It is clear therefore that the Sheldon Court had little reason to conclude that the first test set out in Huson, as to whether McCarty's resolution concerning military pay was foreshadowed by appropriate law (i.e., by federal law), could be answered in the negative.

The second test in Huson is also answered inappropriately by Sheldon. The

"history...purpose and effect" of the rule in McCarty clearly mandates retrospective operation. A finding of federal pre-emption forces state law to give way, at a necessary consequence of the Supremacy Clause of the national Constitution. If in McCarty federal pre-emption was required because grave damage is caused to federal interests, the state court never had jurisdiction to take away from the military retiree his future retired pay. That alone should end the inquiry. That is the teaching of Kalb and Ridgway. But the Sheldon Court falls back upon California law -- which was (and which remains) hostile to McCarty -- for a contrary conclusion. The hostility of the state courts to the McCarty decision can be discerned in In Re Marriage of Jacanin, (1981) 124 Cal. App. 3d. 67. There, the Court of Appeal reluctantly reversed a trial court decision which divided a Navy pension as community property. The bulk

of the decision attacks the majority opinion in McCarty and commends the views of the minority. It is difficult to imagine a more reluctant acquiescence in a Supreme Court decision than the opinion in Jacanin.

As for the "substantial and equitable results" test, the Sheldon Court perceives inequity through reverse telescopic vision. It finds little inequity for the military member; it has but solicitude for the non-service member spouse. The Sheldon Court also exaggerates difficulties which might ensue through a retroactive application of McCarty. It is not necessary in this regard to rebut the Sheldon Court in each such particular. It is sufficient to point out that divorce courts uniformly retain jurisdiction over alimony awards and do not find it onerous to re-open alimony considerations upon motion of either party based upon changed circumstances. Divorce courts could here

do as much. Indeed, if the non-military spouse could make a showing of need (unlike the facts in the present dispute) modification of the award to allow the military member to retain the entirety of his retired pay should allow the ex-spouse to claim support based upon need. Divorce courts are skilled at making such determinations, and these determinations would pose no unusual difficulties.

Sheldon is not persuasive and should not be followed in this case. Ex Parte Buckhanan, supra, is persuasive: it follows the correct federal pre-emption analysis and should serve as a guide to a uniform rule concerning the availability of collateral attack on pre-McCarty decisions dividing military retired pay.

F. APPELLANT REFUSED TO ENTER A STIPULATION WHICH WAS PRESENTED WITHOUT HIS APPROVAL AND OVER HIS OBJECTIONS WHERE, AT MOST, IT IS AN

INADVERTANCE, AND, AT WORST, IT WAS A CLEAR CUT IMPROPER ACTION.

Appellant's Petition for rehearing and modification of the judgment was made to the Court below in light of factual errors in its opinion. These errors were brought about by Appellant's previous attorney of record withholding essential facts from the court which would have revealed that Appellant made no voluntary stipulation. Accordingly, it was appropriate that modifications should be made before the decision became final. New matter was submitted to the court and should have been considered as good cause and grounds for a rehearing. Traders and General Insurance Company v. Pacific Employers Insurance Company (1955) 130 Cal. App. 2d 158, 159; Sime v. Malouf (1949) 95 cal. App. 2d 88.

Appellant in his petition for hearing stated that no stipulation on military entitlements was entered into by him. The

entire testimony referencing the stipulation was fraudulently presented to the court by a previous attorney of record. Appellant's statement to the court in one motion was altered by the same attorney and duress was applied on Appellant. Every attempt by Appellant to claim military entitlements as separate property by Appellant was thwarted by his previous attorney of record, and timely attempts to appeal the improperly procured and entered stipulation were not honored by the same attorney.

Attorney of record acknowledged to the Court of Appeal in both Supplemental Points and Authorities submitted on April 19, 1982 and in oral argument that Appellant did not voluntarily stipulate to the paragraph 10 of the interlocutory decree. However, attorney's discussion is a faint effort and barely touches on the totality of the events which led to the stipulation fraudulently made by attorney.

Relief from a judgment under limited circumstances are applicable where a party seeks to vacate and set aside a stipulation which was not voluntarily given. Carter v Carter (1971, 19 C.A. 3d 479.

Appellant's previous attorney of record stated in the above mentioned Supplemental Points and Authorities:

> "The stipulation classifying future military benefits as community property was not voluntarily and freely given by appellant. No agreement, no offset, and no trade off of property rights was made. When respondent filed for divorce in California, appellant was told that "settled law" in California was that military retired pay was community property. However, Appellant remained adamant that he would take the case to the U.S. Supreme Court for resolution of that issue. The court, in effect, never received an agreement voluntarily or freely given. It was not until September 1979 when the Second District Court of Appeal rendered a decision in favor of separate property for Milhan did Appellant realize that his position could be supported. The motion in the trial court

> to set aside the characterization of community property was filed by Appellant on December 12, 1979 immediately after the Milhan District Court of Appeal decision and long before McCarty was known."

Relief from a stipulation may be granted in discretion of trial court in cases where facts stipulated have changed, there is fraud, mistake of fact, or other special circumstances rendering it unjust to enforce the stipulation. Sanserino v. Shamberger, (1966), 245 C.A. 2d 630.

In this case the stipulation was fraudulently made at trial by attorney of record and it would be unjust to enforce its terms against the Appellant. All subsequent actions by attorney concealed the true facts of Appellant's case wherein he never agreed to a division of his military entitlements.

Grounds upon which trial court may exercise its discretion to relieve party from binding effect of stipulation are that the stipulation was entered into as

the result of fraud, misrepresentation, mistake of fact, excusable neglect, or change of facts or some other special circumstances rendering it unjust to enforce the stipulation. People v. Trujillo, 136 Cal. Rptr. 672, 67 C.A. 3d 547.

Additionally, in this case the trial and appellate courts abused their discretion by not permitting an evidentiary hearing to establish the voluntariness of the stipulation.

If judgment is only partially void, and the void part is severable, that part alone may be collaterally attacked and the balance will remain effective, but if the judgment is not severable the whole may be attacked despite its partial validity. Perini v. Perini, (1964) 225 C.A. 2d 399.

In this case, the Trial Court divided all available property between Appellant and appellee equally, and separately dealt with the issue of the future Army retired

pay by retaining jurisdiction. To set aside that jurisdiction is now appropriate and does not affect the remainder of the dissolution decree.

CONCLUSION

A decision by this Court on the enumerated issues is required to assure consistent and fair interpretation of the relevant statutes and decisions.

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SIDNEY H. YATEMAN
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In Propria Persona

October 11, 1982

A copy of this Jurisdictional Statement shall be served upon the Attorney General of California, as 28 U.S.C. § 2403 (b) applies to this appeal.

DECLARATION OF MAILING

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California, over the age of 18 years, and not a party to the above-entitled cause. My address is Box 2318, Carmel, CA 93921. I served the foregoing document by depositing a true copy thereof in the United States mails in Carmel, State of California, on October 12, 1982, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

Clerk of the First Appellate District
Division Three
350 McAllister Street
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William B. Daniels Esq.,
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563 Figuero Street
Monterey, California 93940

Executed on October 12, 1982 at Carmel, California.

I declare under penalty of perjury that the foregoing is true and correct.

DEANNA PARAVICINI